Supreme Court of the United States

OCTOBER TERM, 1904.

No. 50

FERNAND BONIN *ET AL.*,

PLAINTIFFS IN ERROR,

versus

THE GULF COMPANY.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR PLAINTIFFS IN ERROR.

ASSIGNMENT OF ERRORS.

That plaintiffs in this action in the Circuit Court, and the plaintiffs in error in the present writ of error applied for by them, in connection with their petition for a writ of error, make the following assignment of errors, which they aver occurred in the trial and at the hearing of this cause,

in the Circuit Court of Appeals, for the Fifth Circuit, to-wit:

First—That the Court erred in holding that the plaintiffs in the Circuit Court, and plaintiffs in error herein, acquired any title under the grant herein or through confirmation of the same by an Act of Congress, by the approval of the survey of 1842, described in the record; and that the Court should have held the contrary.

Second—That the Court herein erred in holding that the patent which was issued herein upon the claim of Dauterive Dubuclet, Benoist de St. Clair, and Francois Gonsoulin, on August 21, 1878, as not the first severance of the property described, from the public domain of the United States, but was merely evidence of the title of plaintiffs in error here, or those of whom they were the legal heirs; and the Circuit Court of Appeals should have held the reverse.

Third—That the said Circuit Court of Appeals erred in sustaining the pleas of prescription of ten and thirty years founded upon the statutes of Louisiana, and the Circuit Court of Appeals also erred, particularly, in holding that the character of the possession shown by the defendant in error herein, was sufficient to sustain such pleas of prescription, or that the said possession was such as was extended to the area of the land claimed by the plaintiffs in the Circuit Court, and plaintiffs in error herein, and claimed adversely by the defendant in error herein; that in point of fact there was not such possession of such land as was required by law, nor was there such possession in point of law, which was the possession it should have been to the extent necessary to sustain such pleas of prescription; and the Circuit Court of Appeals should have held the reverse thereof.

These plaintiffs, in the Circuit Court, and plaintiffs in

error here, as errors committed in the trial and hearing of this cause in the said Circuit Court of Appeals, assign as errors the same matters which are set up and so assigned in the Assignment of Errors filed in the United States Circuit Court on January 28, 1902, and relied as errors of said Circuit Court, upon which the reversal of said judgment of the Circuit Court was sought, to-wit:

First—That the Court erred in holding that there was any divestiture of the title of the United States in favor of Walter Brashear or Samuel Watson by the confirmation obtained by the latter from the Board of Land Commissioners; that the said confirmation was made under the authority of the Act of March 3, 1807, Second Statutes at Large, p. 440; that the procedure in case of the final decision of the Board of Commissioners in favor of the claimant authorized by Section 4 did not become conclusive or effective until a copy of the said confirmation being filed in the land office, and survey and plat of the land designated in the confirmation made by the Surveyor General or the other officer acting as such, when and after which, the claimant was entitled to obtain from the Land Office a certificate of confirmation, and its registry, which, upon presentation to the Secretary of the Treasury (Interior) entitled the party to a patent; that the confirmation by the Commissioners was by the said act made to depend for its effect, and was conditioned upon a subsequent survey of the land under the authority of the United States, and until such survey was made subsequent to the confirmation, and the filing thereof in the Land Office, the confirmation was simply an inchoate title to an unlocated tract of land, and applying to no particular tract, until a survey of same was made, designating and identifying the land thereby covered, the title of the land, the subject of the confirma-

tion, remained in the United States. That Act of 1807 intended that the Commissioners should adjudge the existence of good titles to lands held under French or Spanish possessors, but not intend that a final or legal title as against the United States should be made until their bounds have been ascertained and the particular tract defined by survey.

Second—That the Court erred in holding that the *dictum* found in the opinion of the Supreme Court of Louisiana, in the case of *Gonsoulin vs. Brashear,* 5 Martin, New Series (Louisiana), page 35, "The government of the United States have relinquished their title to both," (plaintiffs and defendants), was conclusive to the effect that Brashear had at the date of that suit acquired the legal title of the United States.

Third—That the Court erred in holding that *Gonsulin vs Brashear,* 5 Martin, New Series, was *res judicata,* as concerns the title acquired by plaintiffs subsequent to that suit and decision, evidenced by the United States patent sued upon.

Fourth—That the United States did not part with its title to the land sued for herein until the issuance of its patent to plaintiff's ancestors in 1878; that there had been no prior severance of the said land or property from the public domain.

That the Court erred in holding that the title of the United States to this land or property was divested in favor of any private person prior to the issuance of its patent; or that the same had been severed from the public domain of the United States at any time prior to the issuance of the said patent.

Fifth—That the Court erred in holding that the defendant or any of the authors of its title had held or enjoyed

such possession of said land or property as is or would be sufficient to support or acquire a title to the same under the Civil Code of Louisiana, by presription or adverse possession.

That the only claim by right under which said property was ever at any time held, by any of the persons upon whose supposed title or possession the defendant relies, was to such right, title and interest as may have been had in said property by the vendor or author from whom the several parties in question purchased; that a party holding under such a title does not possess as owner, and that hence his possession is not sufficient to operate a title by prescription, however long may be its duration, and that the Court erred in not so holding.

Sixth—That under the whole of the evidence and testimony offered and introduced on the trial of the cause, defendant could not maintain its claim to a title by the prescription of ten years, established by the Civil Code of Louisiana.

Seventh—That the Court erred in holding that there had been at any time prior to 1878 any survey by the proper officers of the United States of the claim confirmed to Francois Gonsoulin, Dauterive Dubuclet, or Benoist de St. Clair, which had the effect of separating the land or property covered by said claim or confirmation, from the public domain, and making it private property.

Eighth—That the Court erred that there ever was any confirmation by the United States of any claim or title in favor of Samuel Watson, or of Walter Brashear to the land or property which is sued for herein, or of any part thereof; and the Court also erred in holding that the fee of, or title to the said property, at any time had ever passed

from the United States to the said Watson or the said Walter Brashear.

Ninth—That the Court erred in holding that there had ever been at any time any survey or other location or confirmation by the United States of the said land or property, or any portion thereof, in favor of either the said Watson or the said Brashear, or that the claim of the said Watson or the said Brashear relied upon by the defendant herein, was ever located or identified by limits, boundaries or by any lawful and sufficient authority of the United States.

Ninth—That the Court erred in holding that there was any divestiture of the title of the United States to the land or property sued for herein, at any date prior to the issuance by the United States of its patent in favor of Francois Gonsoulin, Benoist de St. Clair and Dauterive Dubuclet, in the year 1878, in favor of any person whatsoever.

Tenth—That the Court erred in any event in maintaining a title in defendant to any quantity of the property or land sued for herein in excess of three hundred and seventy-one arpents, this being the utmost quantity of land which in any event would be comprehended in any confirmation made by the United States of the title or claim of Samuel Watson or Walter Brashear, or of which there was any adverse possession sufficient to support the pleas of prescription made.

Eleventh—That the Court in any event should have instructed the jury to find herein a verdict for plaintiffs on the ground, if on no other, that the title of plaintiffs being a patent of the United States, should have prevailed over any and all other titles purporting to be derived from the United States; and the Court erred in not so instructing the jury.

Twelfth—That the Court erred in holding that at the time of the issuance of the patent herein to Francois Gonsoulin, Dauterive Dubuclet and Benoist de St. Clair, on the 13th day of ———, 1878, the United States was without power to issue said patent; that the Court should have held that the legal title to said property or land was and remained in the United States up to and until issuance of its said patent, and by the latter it conveyed the legal title to said land or property to the parties named therein and their lawful heirs.

Thirteenth—That the Court erred in holding that there was any adverse possession of the said land or property in any of the so-called authors of defendant's title, prior to the issuance of the said patent of the United States; that the Court should have held that any possession of the said land or property prior to the issuance of said patent cannot be the basis of any rights in favor of this defendant, but constituted a trespass; that the Court also erred in holding that there was possession for a sufficient length of time, either by defendant or any or all of the authorities of its pretended title, sufficient to acquire said land by prescription, under the Civil Code of Louisiana, or to support any action by plaintiffs for the recovery of said land or property.

Fourteenth—That the Court erred in holding that there had been or was held by the defendant, or any of the authors of its title, any possession sufficient in character and extent, or any part of the land sued for herein.

WHEREFORE, plaintiffs in error pray that the judgment herein of the Circuit Court of Appeals of the United States, for the Fifth Circuit, be reversed, and such direction be given that full force and efficacy may inure to plaintiffs by reason of the claim, demand and cause of ac-

tion set up in their petition filed in this cause; that the judgment of the said Circuit Court of Appeals, and of the Circuit Court of the United States, for the Eastern District of Louisiana, be reversed, and that the said Court be directed to grant a new trial of this cause.

STATEMENT OF PLEADINGS.

The plaintiffs in error, as the heirs of Francois Gonsoulin, and his wife, brought this ejectment suit in the Twenty-fourth Judicial District Court of Louisiana, for the Parish of St. Mary, by which they claim to be the owners, and to be placed in possession, of the following described property, to-wit:

> A TRACT OF LAND, called Belle Isle, consisting of Section Nineteen (19), Township Seventeen (17), South Range Eleven (11) East, one thousand nine hundred and eighteen and 75/100 acres (1918.75).
>
> Section Twenty-eight (28), Township Seventeen (17), South Range Ten (10) East, nine hundred and seven and 63/100 acres (907.63).
>
> Section One (1), Township Eighteen (18), South Range Ten (10) East, one hundred and thirty-seven and 76/100 acres (137.76).
>
> Section Two (2), Township Eighteen (18), South Range Ten (10) East, sixteen and 44/100 acres, (16.44).
>
> All lying in the Parish of St. Mary, fronting on Wax Bayou, and lying on the Atchafalaya Bay, in the Southwestern Land District of Louisiana.

Said tract was alleged to contain an aggregate of 2980.58 acres.

The suit, on the representation of the defendant, that it was organized under the laws, and was a citizen, of New

Jersey, was removed from the District Court of St. Mary Parish to the United States Circuit Court for the Eastern District of Louisiana. R. 6-7.

In this latter court, defendant excepted, that the alleged heirship of the plaintiffs was set forth in such a vague and unsatisfactory manner as to be unintelligible and untraversible, and, also, that plaintiffs' title was not derained with sufficient plainness and detail, as to permit one defendant to traverse the same. R. 9.

Plaintiffs, by supplemental petition, set out, with more particularity, the heirship of the plaintiffs of the deceased Francois Gonsoulin, and his wife, and, also, a more particular chain of title, by which they deemed themselves to be the owners of the property. R. 10-19.

Thereupon, defendant joined issue on the merits of the case, by the following peremptory exceptions, to-wit:

1. That defendant was in possession of the property, known as Belle Isle, in good faith, under a title translative of property, for more than ten years prior to the institution of the suit, and pleaded the ten years' prescription in bar of plaintiffs' suit.

2. The prescription of thirty years was also pleaded, based upon the alleged continuous, and uninterrupted possession of defendant, and the authors of its title, for more than one hundred years.

3. That the claim of plaintiffs was barred by a certain judgment, rendered by the Supreme Court of Louisiana, and, also, the District Court for the Parish of St. Mary, declaring the title of Gonsoulin to be invalid and of no effect, as against that of Walter Brashear, under whom defendant held. R. 20-21.

On May 16, 1901, defendant amended its pleas of prescription and *res judicata* theretofore filed, by disclaiming

title and possession, as to all that part of the property claimed in plaintiffs' petition, lying east of Doctor's Bayou, being that part of Section 19, Township 17, South Range 11 East, lying east of said bayou. R. 24.

On these pleadings, on November 12, 1901, the case went to trial. R. 24-25.

On November 13, 1901, the jury, under the instructions of the Court, found a verdict against the plaintiffs, on the pleas of prescription, and against the defendant, on its plea of *res judicata,* as in the case of non-suit. R. 107-108.

After an unsuccessful application by plaintiffs for a new trial, the Court, by reason of the verdict of the jury, decreed that there be judgment in favor of the defendant and against plaintiffs, sustaining the plea of prescription, filed by the defendant against the plaintiffs in bar of their demand; the plea of *res judicata,* filed by the defendant, was dismissed, as in case of non-suit; in view of the disclaimer filed by defendant, and to make it clear what part of the land claimed by plaintiffs from defendant, the plea of prescription applied to, it was adjudged that the said plea covered all of Section Twenty-eight, in Township Seventeen South, Range Ten East, and all that portion of Section Nineteen, in Township Seventeen, South Range Eleven East, which lay west of Doctor's Bayou, the said bayou being defined as the bayou appearing upon the official maps of said township, running almost due north and south from Wax Bayou to Lake Belle Isle; that the said pleas and judgment, thereon did not apply to all that part of Section Nineteen, Township Seventeen, South Range Eleven East, which lay east of Doctor's Bayou, the said east portion of the said section being land, title to, and possession of, which was disclaimed by the defendant. R. 116.

From this judgment, a writ of error was prosecuted, to the United States Circuit Court of Appeals, Fifth Circuit, and, from an adverse judgment of said Court, plaintiffs in error prosecute the present writ of error.

The judgment of the Circuit Court of Appeals affirmed the action of the Circuit Court, in sustaining the pleas of prescription, based upon adverse possession of the defendant, and the authors of its title, for more than ten and thirty years. R. 153-156.

ARGUMENT ON ASSIGNMENT OF ERRORS, AND STATEMENT OF FACTS PERTINENT TO EACH.

The first error claimed to have been made by the Court of Appeals, the full assignment of errors being heretofore set out, is the following:

> That the Court erred in holding that plaintiffs in error acquired any title under the grant herein, or through the confirmation of the same by the Act of Congress (April 29, 1816), or the approval of the survey of 1842, described in the record; and the Court should have held the contrary.

In order to fully comprehend the significance of this assignment, it is necessary to state the process by which plaintiffs in error claim to be the owners of the property in dispute.

So far as concerns the United States, the matter seems to have originated in the claim of Dauterive DuBuclet, Benoist De St. Clair, and Francois Gonsoulin, made to the Commissioners appointed for the purpose of ascertaining the rights of persons to land in the Western Land District of Louisiana. The claim was made for about *3300* arpents, and was for the island of woods on "Chafalayn Bay," about four leagues west of its mouth, and about thirty-two

leagues from Attakapas, the island being surrounded by a trembling prairie or marsh, fit only for the raising of hogs. Subjoined to the petition was a certificate of the Commandant Cher DeClouet, stating that what was exposed by the petitioners was true, and the island was only fit for the purpose for which it was solicited. There was also subjoined a certificate by Governor Miro, dated New Orleans, May 2, 1783, directing the Surveyor General to put the parties in possession of the island solicited.

On the examination before the Commissioners, there was no proof of occupancy, or other evidence of title, except that stated above.

The Commissioners reported to the Commissioner of the General Land Office that the claim ought to be confirmed. R. 66-67.

The report of the Commissioners upon this claim is to be found in the American State Papers, Vol. 18, containing Vol. 3 on the subject of Public Lands, Gates & Seaton's Edition, page 126, the claim bearing the number 33. On page 119 of the same book, is to be found the claim of DuBuclet, De St. Clair and Gonsoulin, for "about 3300 arpents," based upon an order of survey, its class being designated by the letter "B." Record, pp. 66-67.

This claim was confirmed by the Act of Congress of April 29, 1816, 3rd Stat. at Large, p. 328.

It should be here noted, that neither the recommendation of the Commissioners, nor the confirmation by the Act of Congress, fixed the extent of the tract so recommended and so confirmed; neither was the land claimed by plaintiffs in error located or defined.

Section 1, of the Act of Congress of April 29, 1816, declares that all claims marked "B," in the report of the Commissioners, and recommended for confirmation, which

included that of DuBuclet, De St. Clair and Gonsoulin, were confirmed. It is admitted that, if the language of this section, used in reference to the claims mentioned, "be and the same are hereby confirmed," stood alone, they would have operated at once; but, by Section 3 of the said act, the effect of this language was qualified and restricted by the declaration, that every person whose claim to a tract of land was confirmed by the act, who had not already obtained a patent certificate for the same, should, *whenever his claim shall have been located, and surveyed according to law, be entitled to receive from the Register of the Land Office a certificate,* stating that the claimant was *entitled to a patent for such tract of land,* by virtue of the act; further, that *the survey should entitle* the party to a patent for the tract of land.

From the provisions of Section 3, it would seem to be obvious, that the confirmation afforded by the Act of 1816, *itself* conveyed no title; that steps, subsequent to the adoption of the act, were necessary, before the title of the claimant was complete, so far as the confirmatory act made it so; that after the confirmation, the claimants were obliged to do certain acts in order to vest a title in themselves, and to divest that of the Government, which evidently had rights to the land, which the claimants sought to have relinquished by the confirmation.

The acts requisite for the claimant to perform, before the confirmation could have any effect, were the following:

1. He should have his claim *located* and *surveyed*, according to law;
2. *After* this survey, to obtain from the Register of the Land Office, a *certificate* stating that he was entitled to a patent for such tract of land;
3. Which cerificate *entitled him* to a patent, to be issued in like manner as provided by law, for patents to land purchased from the United States.

It would seem, therefore, to be obvious, that the confirmation itself, given by the Act of 1816, vested in the claimant no title to the fee in the land, and would become effective only by the accomplishment of the facts and conditions, subsequently to be done or performed, by him; and this followed by the issuance of a patent by the Land Office; all of which would show that it was not the intention of Congress that the fee should pass from the Government, or become vested in the claimant, until the patent was finally issued; and, until that moment, the property remained in the full possession and control of the Government.

The acts of the Commissioners in the matter in question were done under the authority of Section 8 of the Act of March 3, 1807, which provided that the Commissioners should report their opinion on all claims which they should not have finally confirmed by the fourth section of the act; that these claims should be arranged into three general classes, one of which, in the opinion of the Commissioners, ought to be confirmed.

3rd Stat. at Large, p. 440.

It may be mentioned, in passing, though not strictly pertinent here, that even as to such claims which, under the fourth section of the Act of March 3, 1807, were confirmed outright, such confirmation was not intended as a final or legal title, as against the United States, until their bounds had been ascertained, and the particular tract defined by a survey.

West v. Cochran, 17 H. 415-416.
Willot v. Sanford, 19 H. 79-82.
Cousin v. Labatut, 19 H. 202-210.
Maguire v. Tyler, L. Blck. 195-201-2.
Kissell v. St. Louis Public Schools, 18 H. 21.

In *Snyder v. Sickles*, 98 U. S. 203-213, where the survey was disapproved, and it became a nullity, the patent certificate could not issue, so that the rights of the claimant, under these conditions, were not advanced beyond what he acquired by the concession; the confirmation of the Land Commissioners was to be followed by their certificate of confirmation, declaring the party entitled to a survey, and a subsequent certificate from the local Land Office, upon which a patent could be applied for and obtained; which would mean that, until the patent did issue, the power of the Government over the land, to which there had been a confirmation, was complete, and until the patent, which is the final step of the Government's divestiture, was issued, nothing was acquired by the plaintiff.

Michigan, etc., Co. v. Rust, 68 F. R. 166; 168 U. S. 589-93.

Cosmos, etc., Co. v. Gray Eagle, etc., Co., 112 F. R. 4-12.

It is deemed not improper to again mention here, that even where, under the Act of 1807, the decision of the Commissioners was final in favor of a claimant, *a patent was still necessary to convey title.*

Burgess v. Gay, 16 H. 63.

Neither the laws of a State, nor the decisions of any of its courts, can authoritatively determine when the United States loses its title to public lands; for, whenever the question arises in any court, State or Federal, whether the title to land, which has once belonged to the United States, is lost, the question must be resolved by the laws of the United States, and not by the laws or decisions of State courts.

Wilcox v. Jackson, 13 Pet. 516.

It is shown that the claim of DuBuclet, De St. Clair and Gonsoulin, was surveyed by A. F. Rightor and Andrew McCollam, Deputy United States Surveyors, in the fall and winter of 1837 and 1838. (R. 105.) But this was not, and could not, have effect, as a governmental-approved of survey. *Perkins vs. Vincent*, 47 La. An. 579-580.

The approval of Williams, Surveyor-General of Louisiana, on August 1, 1838, of the *field notes* of the survey, declared by the Deputy Surveyors to have been made in the fall and winter of 1837 and 1838, would be at least equivocal, because, without further explanation, it might be that the survey was made, at least in part, at a date subsequent to the approval of the field notes.

The *map* of the survey was completed subsequently, and this the Surveyor approved on December 8, 1842; but, on December 23, 1842, the same month, he made a note on the map that, since it had received his approval, it appeared, by the testimony of the chain-bearers, that the surveys were but partially made in the field. This is not such an approval of the survey as would have any legal effect, without the consent of the claimants or their lawful successors, since, in the face of this so called approval of the Surveyor-General, there was in effect evidence of no approval at all, as the survey itself was incomplete and insufficient in law; it did not bind the claimants. *Afterwards*, in *1878*, Brewster, the Surveyor-General of the United States, did approve said survey without qualification, and this approval was accepted and acted upon by the claimants, or their heirs, who accepted from the Government the patent which was based thereon. The approval of 1842 appears to have been accepted by no one, still less the claimants. The fact that their successors, long subsequent to 1842, were willing to accept a patent based upon this survey, is, in no respect, to the prejudice of their rights.

It is manifest, however, that, by the very terms of Section 2 of the Act of April 29, 1816, the issuance and delivery of the Government's patent itself, was a prerequisite to the vesting of a title in the claimants, and until this patent was delivered to them, the fee was retained in the Government. Under Section 2 of the act, the claimants, after confirmation, were bound to have the property located and surveyed, according to law, and this gave them only a right to receive a *certificate*, declaring that they were entitled to a patent. Even after having received such certificate, it was their further duty to *obtain a patent* before the Government's title was divested.

Congress has full power to declare the dignity and effect of titles from the United States, and this, while legislation as to public lands declares the patent to be conclusive evidence of title; until it issue, the fee is in the Government.

Bagnall v. Broderick, 13 Peters 43.
Wilcox v. Jackson, 13 Peters 498.

Even where a grant has been held as one in *praesenti*, if the granting act provides specifically for the issuance of a patent, the rule is that the legal title remains in the Government until it was issued.

Bagnall v. Broderick, 13 Pet. 436.
Michigan, etc., Co. v. Rust, 168 U. S. 589-93.

And, until this is done, the land is within the jurisdiction of the United States.

Delmonte, etc., Co. v. Last Chance, etc., Co., 171 U. S. 55-7.

Until a patent issue, the legal title remains in the United States.

In cases where the statute imposed upon the confirmee the obligation to apply for and obtain a patent, the issuance

and delivery of such patent is indispensable to the legal title, which may be made to depend upon the patent itself.

Hall v. Jarvis, 65 Ill. 302.

Boatner v. Gentress, 8 Martin, N. S. (La.) 644-49-53.

In the last case cited, it was declared, that the Government might legislate in such a manner as to make the issuance of a patent necessary, before a divestiture of the United States of all property in public lands, and transfer of it to an individual, the Court expresses the belief that ordinary legislation respecting the public domain contemplates the retention of entire power over the object given until that is done.

Even where a grant of land is in *praesenti*, as in the case of the Swamp Land Acts of 1850, and there is provision that a patent shall issue for the lands, there is no title in the grantee until such patent has been delivered.

Roger, etc., Works v. American, etc., Co., 164 U. S. 559-70.

Michigan, etc., Co. v. Rust, 168 U. S. 589-92.

Until, in such case, a patent issues, the legal title remains in the Government.

Brown v. Hitchcock, 173 U. S. 473-6.

The lands are under the full and free control of the Government until the issuance of the patent contemplated and provided for by the statute.

Olive Land, etc., Co. v. Olmstead, 103 Fed. Rep, 568-74.

In *Tegarden v. Le Marchel*, 129 Fed. Rep. 487-8-9, it was held that prescription, or the statute of limitations, does not begin to run against an action of ejectment in the Federal courts, prior to the time when a patent for the land issues.

Gibson v. Chouteau, 13 Wall. 92.

In *Tegarden v. Le Marchel*, 129 F. R. 487-8-9, prescription, or the statute of limitations, does not begin to run against an action of ejectment in the Federal courts, prior to the time when a patent for the land issues.

See also *Redfield v. Parks*, 132 U. S. 239.

In actions of ejectment in the Federal courts, the strict legal title, which is the Government's patent, prevails over all others.

Foster v. Moreau, 98 U. S. 425-27.
Bagnall v. Broderick, 13 Pet. 436.
Highland Boy, etc., Co. v. Strickley, 116 F. R. 855.

Whatever equitable rights may grow up, prior to the delivery of the patent, are enforcible in an equity court alone, but not in an action at law; and while, in an appropriate action, such rights, if any exist, would be recognized, this suit is one in ejectment, in which the strict legal title prevails, and the Government's patent sued on by the plaintiffs, is the best title out of the Government, and the best title known to a court of law.

Bagnall v. Broderick, 13 Pet. 450.
Cooper v. Scheimer, 23 H. 485.

The defense set up here, and which was sustained by the court below, is that of prescription, or a title based on adverse possession for the time required by the Louisiana statute. Such a title is legal, and not equitable, but it must yield to the superior title given by the Government itself, evidenced by its patent.

Gibson v. Choteau, 13 Wall. 92.

No title by prescription can be acquired against the Government, or its grantees, prior to the issuance of its patent.

13 Wall. 100.

Neither the survey of 1837 and 1838, the field notes of which were approved in 1838, nor the map, which was approved in 1842, had the effect of conveying a title to the plaintiffs' ancestors; the survey was not final.

It should be remembered, that the application, or claim, of DuBuclet, De St. Clair and Gonsoulin, was to be confirmed in a tract of about 3300 acres, without definition or location of this quantity of land. The field notes of Rightor and McCollam, which, with the plat of survey, in 1878, were approved by Brewster, Surveyor-General, embraced 2826.28 acres, being less than the quantity claimed. This survey did not become final or binding until filed in the General Land Office (R. 69), when it was made the basis of the patent, which was afterwards issued to plaintiffs' ancestors. The survey itself was under the complete control of the Government, and could have been cancelled if the Government had seen fit to do so, prior to its being made the basis of the patent. The approval of the survey, and the plat, by the Surveyor-General, was not sufficient to make it final and binding; this could only be accomplished by the approval of the Commissioner of the General Land Office, or the Secretary of the Interior. Until this was done, the matter of the survey was still pending, and a new one might have been ordered.

City of New Orleans v. Paine, 51 F. R. 833-38; 147 U. S. 266-7.

In *Van Reynegan v. Bolton*, 95 U. S. 33, it was held that the survey by the Surveyor-General of the United States, of a confirmed claim, is not operative until finally approved by the Department in Washington.

This ruling was approved in *Shanklin v. McNamara*, 87 Cal. 381.

As to the survey in question here, there appears to be, on the plat, the approval of the Surveyor-General, under date of December 8, 1842; but that on December 23, 1842, the same officer declares by his note, just following the approval: "Since the approval of this map, it appears, by the testimony of the chain-bearers, that the surveys, under the contract of October 19, 1837, were but partially made in the field." See report of Surveyor-General, forwarded from New Orleans by V. D. Newcomb, Surveyor-General of Louisiana.

It is evident, from this note, that the survey of Rightor and McCollam had been forwarded by the Surveyor-General from New Orleans, undoubtedly to Washington, there for examination and revision. This is the last heard of the survey, until we are met by its approval, and the declaration that it was filed in the General Land Office, to be found in the patent of 1878. (R., p. 69.) It would seem, to be, therefore, so plain as to require no argument at all that the survey of Rightor and McCollam never was finally approved until 1878, when the patent issued; the so called approval, relied upon by defendant, shows this. As to the pretended approval of Williams, Surveyor-General, made in 1838, it was of the field notes alone, and the integrity of these are sufficiently impeached by the subsequent declaration of Newcomb, Surveyor-General, made in 1842, that they were shown, by the testimony of the chain-bearers, not to have been based in whole upon an actual survey; and this testimony appears to have been forwarded to the Land Office at Washington, along with the plat, for examination. What the result of this presumed examination was, we are not informed by the record, up to 1878, when the patent issued, when the survey itself seems to have been approved.

It may be observed, that under Sections 2395, 2396, 2397 of the Revised Statutes, all Government surveys must be made by actual operations upon the land surveyed, since they direct the marking of corners, of townships, and the distinct marking of each mile between such corners, these marks being different from those designating the corners, while the number of each township and section are to be marked on a tree near each corner, and the like, all making requirements impossible of fulfillment, unless by actual operations on the ground, or in the field itself; and the declaration of Newcomb, Surveyor-General, in 1842, was that there was testimony that, as to part of the survey, there were no operations in the field. In this condition, the matter was submitted to the Land Department at Washington.

If there was no severance of the land from the public domain, by the survey of 1837 and 1838, which received only a qualified approval of the Surveyor-General, in 1842, the land remained part of the public domain, and was the property of the Government. The necessary result of this would be, that any possession of the land held by any one, prior to the issuance of a patent was nothing more than a trespass, as there can be no prescription, or adverse possession, as against the Government, nor by it can there be any acquisition of title against the same.

95 U. S. 335-6.

Le Roy v. Jamison, 15 Fed. Cases, pp. 373-79.

Until the survey received the final approval of the Government, under any conditions, it retained the title.

It would seem, therefore, from the above, that the land in question was not severed from the public domain, either by the confirmation by the Act of Congress of April 29,

1816, nor by the survey of Rightor and McCollam, made in the fall and winter of 1837 and 1838.

The second assignment of error is that the Court erred in holding that the patent issued to DuBuclet, De St. Clair and Gonsoulin, on August 21, 1878, was not the first severance of the property from the public domain; but it was merely evidence of the title of the plaintiffs in error here.

If it be true, as argued above, that, under the terms of the confirmatory Act of Congress of 1816, there could be no severance of the property from the public domain until the issuance of a patent, or, if, not, that the survey of Rightor and McCollam, made in the fall and winter of 1837 and 1838, did not become final, complete or binding until approved, by the issuance of the patent in 1878, it would necessarily result, that the fee to the property remained in the Government until the issuance of a patent, and this really was the initial point from which prescription would begin to run, or when it would be possible for the defendant, and its authors, to acquire any title by adverse possession. There was, in consequence, no severance until the issue of the patent in 1878.

The third assignment is, that the Court of Appeals, in sustaining the pleas of ten and thirty years' prescription, founded upon the statute of Louisiana, and based upon adverse possession, erred; that the character of such possession was insufficient to sustain the pleas of prescription; that it did not extend to the area of the land claimed by the plaintiffs; that the possession was not of the kind, and extent, essential to sustain such pleas of prescription.

It is clear that, from the final approval of the survey, even conceding this to have been made in 1842, which is denied, as hereinbefore set out, defendant had only an

equitable title to the land; that is, it had the basis upon which to apply for and obtain a legal title, evidenced by a patent, which plaintiffs now have; and it has been held that prescription, or the statute of limitations, does not run against an equitable title, and this could not avail a defendant against a legal title.

Baird v. Wolfe, 7 Fed. Cases, pp. 429-431.
See also 4 McLean, 549.

Preliminary to any discussion of the grounds of this assignment, although prescription, under no circumstances, could begin to run, even under the theory of defendant, until 1842, when the plat of the Government's survey was *soi disant approved*, because, until up to that time unquestionably, the Government's title had never been divested, it would be instructive to ascertain the nature of the title of Walter Brashear, under whom, the defendant claims, so far as it it based upon written title of any character whatsoever, apart from any muniment derived from adverse possession alone.

The pretended title of Brashear, here adverted to, not because it is really a part of this case, but simply for the purpose of convenience and information, seems to have been the following:

On July 25, 1809, the Judge of the Parish Court of Attakapas, under a writ of *fieri facias* issued to him, in the suit of *John N. Kershaw v. Samuel Watson*, set over to the former all the right, title and interest which on February 27, 1808, the said Watson had in the "tract or parcel of land known as Belle Isle, situate near the mouth of the Chafaliah, in the parish aforesaid" (Attakapas); the tract of land contained "the whole island of *1500 acres, more or less.*" (This is the only mention in the deed of an island.) R. 32-33.

It should be noted, that the area of the tract, inferentially declared to be an island, was stated to be *1500 acres*, more or less, and the conveyance was only of the right, title and interest of the defendant, Watson.

Kershaw, having thus acquired the rights and claims of Watson, the former on July 24, 1809, which was the *day before* the conveyance of the Justice of the Peace to Kershaw, if the dates of the respective deeds are to be attended to, conveyed to Henry Johnson "all the right, title, interest, claim and demand of the said Kershaw thereto," to the land, which was described "as being a certain tract called Belle Isle, situate near the mouth of the River Chafiliah, in the parish aforesaid (St. Mary), containing *1500 acres*, more or less."

It is clear, by this deed, that Kershaw undertook to transfer to Johnson nothing more than his right, title and interest, or quit claim, to the property. R. 34.

Johnson appears to have held, under this deed, for less than a month, since August 5, 1809, he "renounced, relinquished and forever *quit-claimed*," unto Walter Brashear, all his right, title, interest and claim in and to the tract or parcel of land called Belle Isle, situate near the mouth of the "Chafalaya," supposed to contain *1500 acres*. R., p. 35.

It will be observed that, in all three of these quit-claims, or releases, the extent of land to which the right, title and interest of the vendor was conveyed, was declared to be *1500 acres*, more or less. It will be pertinent to inquire how it was that the title of Brashear became finally expanded from *1500 acres*, more or less, to *2800 acres*, or nearly double the amount, as was first claimed by the defendant, especially when the Commissioners confirmed Brashear's title to 316 9/100 acres, and no more, as will be seen.

It further appears that on July 22, 1811, Walter Brashear made to the Board of Commissioners, appointed for the purpose of ascertaining and adjusting claims for lands in the Western District of Louisiana, his claim for *571 arpents*, under an order of survey and settlement in favor of Samuel Watson. Brashear appears to have produced in support of his claim the affidavits of two witnesses, one Oliver Ormsby, setting out that, under a contract made with William Martin, on November 27, 1803, he made an establishment upon, and improved, the land (571 arpents) for the use and benefit of the claimant (Brashear); that while he remained on the land, which was for only ten or twelve days, Martin built a cabin thereon, and cleared about three acres of land, on which vegetables were planted; that affiant sold his contract to Creed West, who continued to reside on the land, and cultivated the same for two or three succeeding years, as the tenant of Brashear; that the land had been occupied and cultivated ever since December, 1803. The affidavit of the other witness, William Briggs, set out that he was on the land when it was occupied by Martin, from whom, he understood, that he had resided there as a tenant of the claimant; and at that period Martin had cleared about ten or fifteen acres, and had a good cabin built. R. 64-65.

It is shown that the Board of Commissioners adjourned on May 11, 1815, some four years afterwards, without any action at all upon the claim thus made by Brashear. (R. 65.) Notwithstanding this, however, on July 22, 1836, these same Commissioners, by Certificate B No. 1169, certified that Brashear was confirmed "in his claim to a tract of land containing *371 superficial arpents*, equal to *316.96 acres*, founded upon an order of survey in favor of Samuel Watson, dated July 30, 1802," * * * "situate in the County of Attakapas, on the island known by the name of

Belle Isle, near the Bay of Chaffoliere." R. 62-63.

It would thus appear that, although Brashear had acquired a quit-claim to *1500 acres* of land, that he deemed himself entitled only to *571 arpents*, to which he claimed a confirmation; but his claim for this number of arpents was further diminished by the Commissioners to 371 superficial arpents, or 316.96 acres, which would show that up to July 22, 1816, Brashear believed himself entitled to only *571* arpents, for which he prayed for a confirmation; but, in the opinion of the Commissioners, in their certificate of July 22, 1836, the extent of his claim was diminished still further, as he was allowed only *316.96 acres.*

It is manifest, therefore, that, according to Brashear's idea of the area covered by his own claim, it was only 316.96 acres, the extent of land which was awarded to him by the Commissioners on his application. The claim of Brashear was never surveyed, no patent was ever issued to him for it. It is clear that Brashear, all during the life time, never claimed to own more than 316.96 acres of land, situate on *some part* of the island; that this was not located, nor defined; that it was not a specific tract, but a certain quantity of land, for which neither he nor his heirs never at any time received a patent, and which was never surveyed. He could, under no circumstances, have claimed more than 316.96 acres, and, as to this, his title was fatally defective, because he had never received any patent for it, nor anything that was equivalent to a patent, nor was it ever located or defined by a Government survey.

West v. Cochran, 17 H. 402-14.
Snyder v. Sickles, 98 U. S. 203-13.
Willmot v. Sanford, 19 H. 79-82.
Cousin v. Labatut, 19 H. 202-210.
Magwire v. Tyler, I Black 195-201-2.
Kissell v. St. Louis Public Schools, 18 H. 21.

The ownership of Brashear and of the defendant, under whom it claims, does not result from any written chain of conveyances, or titles, or any divestiture from the Government, resulting from its voluntary act; but, if there be any title in the defendant at all, which is denied, it is such title as might result by adverse possession, or prescription, in favor of defendant, or the authors of its title.

The contention of the plaintiff in error is, that there has been no such possession by the defendant, or its authors, either in kind or extent, which would give it a title; that the only real title to the land in question is that which results from the patent issued to plaintiffs' ancestors in 1878.

Having thus, for purposes of explanation alone, set out the position of Brashear as regarding any title he might have had from the Government, we proceed to discuss the character and extent of the possession disclosed of defendant and its authors.

It is claimed by the former that prescription begins to run against the plaintiffs in error from the date of the approval of the survey of Rightor and McCollam, which, as we have seen, at the very earliest, would begin with the approval of the Surveyor-General, of December 8, 1842, although, on December 23, 1842, this approval is practically withdrawn by his declaration that, since it appeared, by the testimony of the chain-bearers, that the surveys were but partially made in the field. As we have already argued, this certificate would seriously qualify, if not do away entirely with, the approval, especially as the portion of the survey not made in the field is not specified, and the note of the Surveyor-General, therefore, would impeach the entire survey; it does not indicate what portion was made in accordance with law, and what was not so made; and it has also been argued

that this left the matter of the survey, entirely at large, subject to be accepted or rejected by the Land Department, and that it was only *finally accepted* in 1878, after "the plat of survey made was placed on file in the General Land Office," and was approved by the Surveyor-General on April 22, 1878. R., p. 69.

It would also seem, from the recitals of the patent, which import absolute verity, that the *patent certificate* to which plaintiffs' ancestors were entitled, under the Act of Congress of April 29, 1816, had been deposited in the General Land Office, a proceeding which, under the confirmatory act, was absolutely necessary before the patent, which was the final divestiture of the Government, could be issued. R. 68-69.

Taking, then, for the sake of argument alone, December 23, 1842, as the beginning of the prescription which might have run against the plaintiffs in error, it is respectfully submitted, conceding the proof of all the facts as to which there is any evidence at all, there is no result in the showing of such possession, as would make out a title by prescription in favor of Brashear, or those holding under him. The prescription claimed, being without any title at all, must necessarily be that of thirty years, being based upon mere possession alone.

The prescription of ten years, by which a party becomes the owner of property by possession, must be in good faith, and under a title. R. C. C. (La.), 3474-3478.

The prescription of thirty years is based upon possession alone, without any title, and whether or not the party be in good or bad faith. Revised Civil Code (La.), Arts. 3475, 3499.

By the terms of Revised Civil Code (La.), Art. 3503, however favorable soever prescription may be, it must be re-

stricted within just limits; thus, in the prescription of thirty years, by which property is acquired without title, it extends only to that which has been actually possessed by the person pleading it.

Donnegan v. Martinot, 9 Martin, O. S. (La.) 43.
Prevost v. Johnson, do 174.
Gillard v. Glenn, I Rob. (La.) 159.

Adverse possession, without a title, does not extend beyond the land actually enclosed. *Prevost v. Johnson*, 9 Martin, N. S. (La.), 174; *Ellis v. Prevost*, 19 La. 251-257. Adverse possession is not established sufficiently to support prescription where neither the extent of the land enclosed, or improved, *nor the time when such enclosures or improvements were made*, is shown. *Basseron v. McRae*, 9 La. An. 281. The *particular spot, or spots*, where the possession was exercised must be shown. *Bernard v. Shaw*, I Martin, N. S. (La.), 480. The *full limit* and *extent* of the property so possessed must, also, be shown. *McDonough v. Childress*, 15 La. 566. Its *commencement* must be shown by a corporeal possession. *Wilson v. Martin*, 10 La. An. 327.

The only testimony to show any possession at all in Brashear, and it is upon possession as a fact alone, that the judgment of the court below maintaining his title, can be affirmed, rests upon the testimony of Wofford (R. 84), and Lawrence (R. 86). The testimony of neither one of these parties shows possession in Brashear sufficient to maintain prescription. Touching this, the first statement made by Wofford is found on R. 85. He says that Dr. Walter Brashear raised cane on the island up to about the year 1834 or 1835, and that the witness's brother was his overseer about 1834 or 1835; that he *acquired the informa-*

tion he gives *from Dr. Brashear and his brother.* This statement is no evidence at all, because it appears to be based entirely upon hearsay, and in no respect upon his own knowledge. The witness adds that, after this—but he *does not state when*—that the island was used as a cattle ranch by Dr. Brashear, and was so used by him at the time of his death in 1860. This statement is insufficient to show possession in Brashear, sufficient to sustain the prescription of thirty years, because its *date,* or *commencement,* is not fixed; so that, therefore, it is impossible, from this statement, to ascertain when the prescription began to run.

10 La. An. 327; 11 Rob. (La.) 56; 9 La. An. 281.

It is impossible to fix with certainty the commencement of Brashear's possession prior to 1860. The same may be said of the declarations of the witness, that he knew at one time the island had been rented to a Dr. Tarleton, who had possession for about one year only. It seems that Dr. Brashear died in 1860, and whatever was possessed by him then passed to his heirs. Supplying all the deficiencies of the witness's testimony, it would seem that it could only establish, as a fact, that Brashear was in possession of the land when he died in 1860, and from this year alone could prescription, with any certainty, be fixed as beginning. R. 84-85.

The testimony of Robert B. Lawrence (R. 86-90) is to the effect, that he had been all over the island many times from 1858 to 1892; that its natural boundaries were Wax Bayou on the north and west, Doctor's Bayou on the east, and Atchafalaya Bay on the south; and this was the property known as Belle Isle Island; that in 1855, when he first knew Belle Isle, it was in possession of Dr. Walter Brashear. The balance of the

witness's testimony, relating to the possession of Brashear, is clearly hearsay, or traditional, and in great part relates to occurrences which happened before he was born.

It is an indispensable requisite of testimony offered to show possession, in support of a plea of prescription, based upon adverse possession, that the possession pleaded should be of the identical land which is sued for.

It may be very seriously questioned to whether or not the testimony of Wofford applies to the particular land which the plaintiffs in error seek to recover, and which, the defendant insists, it has acquired by adverse possession. So far as concerns Lawrence, it would seem that as late as April 30, 1869, when he bought the place at a sale on execution by the Marshal, it is clear, what he thought, was the extent of the property, because in the deed of the Marshal to him, in the suit of *Warfield v. Heirs of Brashear* (R. 94), and which was, from that date, Lawrence's muniment of title, the property in question is described as follows:

> "3rd. A tract of land fronting on Wax Bayou and Atchafalaya Bay, in the Parish of St. Mary, containing *400 acres* of land, more or less, and known as 'Belle Isle Island.'"

From which it would seem that Lawrence understood, when he bought Belle Isle, that he was acquiring only *400 acres of land;* although, when Lawrence, on July 20, 1892, (R. 40) sold the tract of land known as Belle Isle to Withers, he conveyed "*400* acres in high land, more or less, *and 2400* acres of sea marsh or pasture lands, in all 2800 acres, more or less;" at the same time declaring that the property was the same which he acquired at the execution sale by the United States Marshal, on April 30, 1869, in the suit

of *Warfield v. Heirs of Brashear*, it being also the same land, the deed declared, that Walter Brashear had acquired from Henry Johnson on August 5, 1809, which was attached to the act.

Under the quit claims of Kershaw and Johnson, the tract was stated to be *1500 acres;* the application of Brashear for confirmation stated it to be *571 arpents;* the finding of the Commissioners confirmed his title only to *316.96 acres*, all of which, was much less than the area of the whole island, so called, which, by deeds, under which the defendant claims, was declared to be *3800* acres in extent. Besides, the fact that Brashear must be considered as holding, under his title, likewise Lawrence, it is quite evident that the testimony of both Wofford and Lawrence is not clear and exact, as to the extent of the possession of Brashear, how much land he had enclosed or physically taken possession of, since, as to its area beyond 316 96/100 acres, being entirely without title, he acquired dominion and ownership of this overplus, only inch by inch, of so much of the land as he actually reduced to possession. They are also uncertain as to the *commencement* of Brashear's possession, and this is an indispensable requirement, since the duration of his possession would date from this, and it must be made certain in order to calculate the term of his possession. It appears, from the testimony of Wofford, that Brashear was in possession of some portion of, what is called the island, at his death in 1860, and this is as far as his testimony goes. The testimony of Lawrence proves simply a like possession, undefined in character or extent, and not fixed at all as to precise date from 1855.

It is well recognized that where a party pleads prescription, and his possession is not under title, but his muniment is based upon possession alone, his tenure is that of a

usurper or an intruder, and he acquires title only inch by inch of the land actually occupied.

Dennegan v. Martinot, 9 Martin, O. S. (La.), 43.
Prevost v. Johnson, do 174.
Gillard v. Glenn, 1 Rob, (La.)159.
R. C. C. (La.) 3503.

It is fully shown that, so far as concerns the present pretensions of defendant, Brashear took possession of Belle Isle without any pretense of title whatsoever; that the only title he could have made was to 316.96 acres, undefined and unlocated, to which, on his own application, he was confirmed. This was not followed by any Government survey, by which this number of acres was identified, and it was a confirmation only to a *quantity*, but not to a *specified tract*, of land; it was without effect, at any rate until fixed, or until a patent issued; it was, therefore, incumbent on defendant to show the precise extent of the possession of its author, in any event. 18 La. 484; 6 La. An. 66; 7 La. 123; 1 Rob. (La.) 378; 13 La. 338; R. C. C. (La.) 3505.

Assuming, however, for the sake of argument, that the property was severed from the public domain, and that the plaintiffs, or their ancestors, were in a position to claim a patent from the time of the survey in 1842, possession of thirty years in Brashear, and his heirs, would be necessary for him to acquire a title; 1872 would, therefore, be the earliest date at which Brashear and his heirs could have become the owners of the property by adverse possession. Brashear died in 1860, and on April 30, 1869, the property was sold under an execution sale by the Marshal to Robert B. Lawrence (R. 36-39). Robert B. Lawrence was not one of the heirs of Walter Brashear, so that this acquisition was by one who was a stranger to the succession. At the death of Brashear, who was a grandfather

of Robert B. Lawrence, the latter was not an heir, but his mother, one of the children of Brashear, who necessarily excluded him, was an heir (R. 87); and there is no evidence of her having died at any time subsequent to Brashear's death.

At the date that Robert B. Lawrence claims to have acquired the property, he succeeded only to such rights, claims and presentations as Brashear and his heirs may have had to the property, and this was all that he could have acquired by his purchase. 3 Martin, O. S. (La.), 615; 8 Martin, N. S. (La.), 537; 10 La. 453; 40 La. An. 333.

Putting the case in the aspect most favorable to the defendant, the possession of Brashear and his heirs continued, at most, from 1842, when the survey of the claim of DuBuclet, De St. Clair and Gonsoulin received a *quasi* approval, until 1869, when their rights, whatever they were, were purchased by Lawrence, at the Marshal's sale, in the suit of *Warfield v. Heirs of Brashear*. This would give, at the most, as is stated, a possession of twenty-seven years.

Turning, however, to the Marshal's deed (R. 37), given to Lawrence, which was fully accepted by him, as his muniment of title, we find the following, both after and before mentioning other property, the following description of the only property he purchased, which could be considered as even intimating the property sued for here:

> "3rd. A tract of land fronting on Wax Bayou and Atchafalaya Bay, in the Parish of St. Mary, containing *four hundred acres* of land, more or less, known as Belle Isle Island."

This description, is plainly too vague and indefinite, to convey title to any land at all, as it would equally apply to

any other land fronting on Wax Bayou and Atchafalaya Bay, in the Parish of St. Mary. It was not a sale *per aversionem*, or by boundaries. 3 La. An. 326; 43 La. An. 42. In any event, Lawrence thus acquired only *four hundred acres of land, more or less*, which, approximately, is about one-seventh of the quantity of land claimed by the defendant here, by reason of adverse possession. It must not be forgotten that the defendant sets up no title at all, but relies on naked possession alone for his right; and the so called title of Lawrence, is here referred to, merely as showing what he undertook at the time to acquire.

If, however, it should be claimed that defendant has the right to add the period of the so called possession of Brashear, and his heirs, to that of Lawrence, in order to give a title by possession to the whole of the island, under Revised Civil Code (La.) 3493, 3494, by which the possessor is allowed to make the sum of his possession, necessary to prescribe, by adding to his own possession that of his authors, there are insuperable difficulties in the way of such a procedure. In the first place, in order that Lawrence might unite the possession of Brashear and his heirs to his own, the former must have possessed in good gaith and under color of title. *Innis v. Miller*, 10 Martin O. S. (La.), 289-292.

As has been seen, Brashear was not in good faith at all, and, in fact, this is not claimed, because defendant relies upon adverse possession of thirty years as a means of making out a title, and this necessarily assumes possession in bad faith. Revised Civil Code (La.) 3499. And it is not claimed that he had any written title. Revised Civil Code (La.) 3503. Besides all this, Lawrence had full knowledge of the nature of Brashear's possession and that of his heirs, and was fully and completely acquainted with all its

vices and defects, as is abundantly shown by his testimony. (R. 87-90.)

It is a further requisite of the power of the possessor to add the possession of his author to that of his own, in order to complete the required period, that the latter should have held in good faith, since a purchaser of property acquiring from one who has held in bad faith, can never add the time of his author's possession to his own for purposes of prescription. *Kohlman v. Glaudi,* 52 La. An. 700-703. The plea of thirty years' prescription necessarily admits and declares Brashear to have been in bad faith, besides which, the facts unquestionably show that he was without any title at all, and that he held with full knowledge of this fact.

It was a further indispensable prerequisite for Lawrence to tack on the possession of Brashear and his heirs to his own to complete the possession of thirty years, that the land as to which this right is sought to be exerted should be held by the previous holder by a deed, as such right of adding the possession of his author to that of his own, is conditioned on the fact, that the former should have acquired by title; this rule applies only where the land in question is included in the boundaries given by a deed of such possessor's author. It is seen there was no deed at all to Brashear, who relies upon naked possession without a deed, nor any from Brashear and his heirs to Lawrence, who acquired at an execution sale, and at this, only *400 acres* of land; so that, in no evnt, could the possession of Brashear and his heirs, of which Lawrence could avail himself, extend beyond these *400* acres, which were unlocated, undefined, and not identified, in any manner at all, assuming that the description in the Marshal's deed, is such description, as would convey property at all.

Railway Co. v. Lerosen, 52 La. An. 192-194-204.

It has been held, where the author of a party's title, at the time of the transfer to the former, had *possession* of the property, but *no title* to it, the party, unless *he himself* had possession thirty years, fails to establish title by prescription,

Innis v. Miller, 10 Martin, O. S. (La.), 292.

It cannot be claimed by defendant, who claims, by adverse possession alone, that Brashear, or his heirs, had a written title of the property, and it is clear that they did not possess the property for a sufficient time, to acquire a title by prescription, by that fact alone.

By Revised Civil Code (La.) 3505, the rule announced in R. C. C. (La.) 3486, as to the ten years' prescription, is extended to the prescription of thirty years.

Whatever kind of a title Lawrence may have acquired to the nondescript tract set out in the Marshal's deed, as fronting on Wax Bayou and Atchafalaya Bay, in the Parish of St. Mary, containing 400 acres, more or less, and known as Belle Isle Island, he was, under any circumstances, a possessor in bad faith, and it would require the possession of thirty years for him to acquire a title by prescription. This he never had, as his possession ended July 20, 1892, when he sold to Withers, by a description of property which became expanded from *400* acres to *2800* acres, the description being the following, to-wit:

> "A certain tract of land, called Belle Isle, situate, lying and being in the Parish of St. Mary, State of Louisiana, bounded on the west by Wax Bayou, upon which said island fronts, and on the South by Atchafalaya Bay, and on the east by Doctor's Bayou, containing 400 acres, high land, more or less, and 2400 acres sea marsh or pasture land, in all 2800 acres, more or less." (R. 40-42.)

It further appears, from the testimony of Withers (R. 91-93), that at the time of his purchase he had knowledge of the claim set up to Belle Isle, and that his information was that this title had been annulled by judgment of the Supreme Court of Louisiana about sixty years before he bought the property, and that the patent, or claim of plaintiffs in error, based on the same title, was null and was of no value or validity. It would seem from this that Withers had brought home to him knowledge of the adverse claim of plaintiffs, and, under the advice of others, undertook to assume that it was of no validity. This, of course, bound Withers, but nobody else, and his information was not correct. The title of plaintiffs' authors had not been annulled by the Supreme Court of Louisiana, in *Gonsoulin Heirs v. Brashear*, 5 Martin, N. S. (La.), 35, where the contest was, which had the best *equitable* title, *under the Spanish Government*, and the suit concerned only the title of plaintiffs resulting from the confirmation in 1816; that, as to the Government, the Court declared, the parties stood upon equal pretensions before the court, and they were, therefore, thrown back upon their titles under the former Government, under which the dominion of the soil was vested in the Government, and that no title became vested until the issuance of a grant; that the Government of the United States, when it took possession of the country, showed that it considered that the claims of both parties required not only confirmation, but, also *a patent to vest the title;* that the defendants had the best equitable title under the Spanish Government. The question of prescription was not examined into at all, as the court did not deem it necessary. 5 Martin, N. S. (La.), 35-36-37.

The plaintiffs here, it seems, have obtained from the

United States its legal title in the form of a patent, a muniment which they did not possess in 1826, when the case in 5 Martin, N. S. (La.), 35-37, was decided; and upon that they now sue, thus making a stronger showing than was had in 1826, at which time their claim had not been even surveyed.

Having thus brought to him the knowledge of plaintiffs' rights and claims to the land, Withers was undoubtedly a possessor in bad faith, and required the possession of thirty years to complete his title.

On February 7, 1898, Withers sold to Dorwin (R. 54), while Dorwin sold to defendant on March 31, 1898. (R. 98.)

The citation in this suit was served July 1, 1898, which, of course, interrupted prescription, which remains suspended during the pendency of the suit, which has lasted until the present date. Revised Civil Code (La.) 3518.

So that the suit was brought before the expiration of thirty years necessary to complete by prescription, the title to Lawrence himself.

It has been claimed that the case of *Joplin v. Chachere*, 107 La. 522, 192 U. S. 94, is decisive of this suit in favor of the defendant. In the case mentioned, the question was, whether a tax title, based upon the assumed ownership of a party whose claim was confirmed by the Act of Congress of April 29, 1816, was valid for the purpose of taxation by the State. The Court maintained the tax sale, as well as the adverse possession thereunder.

The facts of the present case are radically different from those in the Joplin case. There the confirmation, which was decided to convey a title, concerned an exact quantity of land, located and identified, by the possession of the confirmee. It concerned a definite quantity of land, the extent

of which was marked by known boundaries. The title of Poiret, the original holder, was obtained by occupation, and the right of his successor, Joplin, was dependent upon that. The Court declared that it was inconceivable that the boundaries of the tract were not ascertained by them; the certificate was for an expressed exact quantity of land; the identity of the land was fixed by evidence before the Board.

From all of which, it was concluded by the Court, that the land was sufficiently identified and located by the confirmation itself, and operated as a segregation of the property from the public domain.

Here, however, the conditions were entirely different; the land claimed was 3300 arpents (R. 66); there were no conditions of settlement, etc., subjoined to the certificate of the Commandant accompanying the petition of the claimants; there was no proof of occupancy, or other evidence of title, except the simple granting of the order of survey; the Commissioners expressed their opinion that the claim ought to be confirmed (R. 66-67), and in this condition it was confirmed by the Act of Congress of 1816. The recommendation for confirmation by the Commissioners, therefore, identified no particular tract of land, as was the fact in the Joplin case; nor was this done by the Act of 1816, confirming it. The first thing towards locating or defining the land confirmed was the survey by Rightor and McCollam, the map of which was partially approved by the Surveyor-General in 1842, and, from the language of which approval, it would appear that the claim was subject to further action by the Land Department, and this, it has been seen, was only had in 1878, when it appears for the first time, with the map of survey, on file in the General Land Office, approved by Brewster, Surveyor-General of the State of Louisiana, April 22, 1878. (R. 69-70.)

The difference between the facts of this confirmation and that found in the Joplin case is palpable, and serves to place the present controversy entirely beyond the authority of the decision mentioned.

The remaining assignment of error are sufficiently covered by the foregoing discussion, upon which they are submitted.

There can be no question raised on this writ of error, except whether or not the judgment of the Circuit Court of Appeals, in maintaining the defendant's plea of adverse possession, is correct, or not. It is submitted that the judgment, so far as it maintains such plea, is erroneous; the judgment of the Circuit Court dismissing the plea of *res judicata* based upon the decision in *Gonsoulin Heirs v. Brashear*, 5 arMtin, N. S. (La.) 35, was in case of non suit; so, therefore, this matter is out of the case altogether.

The judgment of the Circuit Court of Appeals simply affirmed that of the Circuit Court.

The judgment to which the writ of error is prosecuted should be reversed, and an order made directing the entry of a judgment for the plaintiffs in error.

Respectfully submitted,

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SEPTEMBER, 1904.